Nos. 07-1455, 07-1506

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

TRIBUNE PUBLISHING COMPANY
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JULIE B. BROIDO
Supervisory Attorney
GREGORY P. LAURO
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-2965

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case No.
	)	17-CA-21700
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for National Labor Relations Board ("the Board") certify the following:

A. ***Parties and Amici:*** Tribune Publishing Company ("the Company"), is the petitioner before the Court. The Company was the respondent before the Board. The Board is the respondent before the Court; its General Counsel was a party before the Board.

B. ***Ruling Under Review:*** The case involves the Company's petition for review of a Decision and Order of the Board issued on September 28, 2007, and reported at 351 NLRB No. 22.

C. ***Related Cases:*** This case has not previously been before this Court or any other court. The Board is not award of any related cases pending in or about to be presented to this court or any other court.

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Dated at Washington, DC
This 16th day of May, 2008

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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Tribune Publishing Company ("the Company") to review, and the application of the National Labor Relations Board ("the Board") to enforce, an order the Board issued against the Company, finding that it committed an unfair labor practice. The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act, as amended ("the Act") (29 U.S.C. §§ 151, 160(a)), which

authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's Decision and Order, which is final under Section 10(e) and (f), issued on September 28, 2007, and is reported at 351 NLRB No. 22. (A 172-187.)[1] The Company filed its petition for review on November 6, 2008. The Board filed a cross-application for enforcement on December 13, 2008. These filings were timely because the Act places no time limitation on such filings.

STATEMENT OF THE ISSUE PRESENTED

The Board found that, several months after the parties' CBA expired, the Company reached a new, separate agreement to allow employees to use its direct-deposit system to remit their union dues, and that all employees had signed new, written authorizations for such direct deposits. After initially complying with that agreement, the Company unilaterally terminated the direct deposit of union dues. Thus, the issue is whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally reneging on its new agreement to use its direct-deposit

[1] "A" references are to the Appendix filed by the Company, and "SA" references are to the Supplemental Appendix filed by the Board. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

system to transmit union dues from the paychecks of employees who had executed direct-deposit authorization forms.

APPLICABLE STATUTES

All applicable statutes appear in an addendum to this brief.

STATEMENT OF THE CASE

Based upon charges filed by the Graphic Communications Conference of the International Brotherhood of Teamsters, Local 16-C ("the Union"), the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally discontinuing the direct deposit of employees' union dues. (A 172-73; 119-21.) Following a hearing, an administrative law judge found that the Company had violated the Act as alleged (A 178-87), and the Company filed exceptions. The Board (Members Liebman, Schaumber, and Kirsanow) unanimously affirmed the judge's findings, with modifications. (A 172-77.)[2]

[2] In addition, the complaint alleged, and the judge found (A 176 n.5), that the discontinuation of direct deposit of union dues discriminated against the employees' protected union activity in violation of Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)). The Board, however, found it unnecessary to address that finding because it would not materially affect the remedy (*id.*), and the Company does not contest that finding in its opening brief to the Court.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Board based its findings on the facts summarized below, which are essentially undisputed.

A. Several Months after the CBA Expires, the Company and the Union Reach a New, Separate Agreement To Allow Employees Who Sign Written Authorizations To Use the Company's Direct-Deposit System To Pay Their Union Dues

The Company and Union entered into a series of collective-bargaining agreements ("CBAs"), the most recent of which expired on November 30, 2001. (A 172; 15.) The expired CBA contained a union-security clause and a dues-checkoff provision, which provided that, upon the employees' written authorization, the Company would deduct their union dues from their paychecks. (A 172; 138, 144.) On December 19, a few weeks after the CBA expired, the Company told employees that it would cease deducting union dues. (A 172; 23-24, 36, 145.)

For several months after the CBA expired, Union Secretary Roger Hall collected dues directly from employees. (A 172; 25.) Then, in March of 2002, he approached the Company's payroll coordinator about using the Company's direct-deposit procedure to deduct union dues from employees' paychecks. (A 172-73;

27-28.)[3] Hall distributed copies of partially completed direct-deposit authorization forms to the 37 employees who had indicated that they wanted to use direct-deposit to pay their union dues. (A 173 & n.4; 27-28, 41-42, 168.) Each form provided that it was revocable upon "notification of cancellation" by the employee who had signed it. (A 168.)

After all the employees completed and signed the forms, Hall brought them to Company Administrative Manager Mary Twenter, who had authority to agree to labor proposals. (A 173; 28-30, 41-45 168.) Twenter agreed to use the Company's direct-deposit procedure to pay union dues, telling Hall that it was "a good idea." (A 173; 29, 47.) She also offered to provide the Union with an itemized statement identifying which employees had paid their dues through direct deposit, as well as the amount deducted from each employee's paycheck. (A 173; 28.)

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[3] The direct-deposit procedure set forth in the Company's handbook provides in pertinent part:

> All Tribune employees are encouraged to sign up for direct payroll deposit. Direct deposit allows your paycheck to be electronically deposited in your back account first thing payday morning. We have the capability to deposit in virtually any bank and up to four banks per employee. You may pay loans, deposit into savings accounts and have your net pay deposited in your checking account. Contact the payroll coordinator for sign-up materials.

(A 173 & n.3; A 150.)

B. The Company Initially Honors Its New Agreement To Use Direct Deposit To Deduct Union Dues from the Paychecks of Employees Who Signed Written Authorizations, But then Unilaterally Terminates that Agreement

On April 26, the Company completed a successful "trial run" of the transfer of union dues through the direct-deposit system (i.e., no funds actually were transferred at that time). (A 173; 29-30, 47.) On May 10, the Company successfully effectuated the direct-deposit of union dues. (*Id.*) It also provided the Union with an itemized list of the amount of union dues deducted from each employee's paycheck. (A 173; 30.)

On May 21, however, the Company, without bargaining, told the Union that it would no longer permit employees to use the direct-deposit system to pay their union dues. (A 173; 30, 48.) The Company then notified the employees of its unilateral decision by letter dated May 24. (A 173; 169.)

II. THE BOARD'S CONCLUSION AND ORDER

Based on the foregoing facts, the Board (Members Liebman, Schaumber, and Kirsanow) unanimously adopted the administrative law judge's finding that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally terminating its new agreement, reached months after its CBA expired, to allow employees to use its direct-deposit system to pay their union dues. (A 174-75.) The Board's order requires the Company to cease and desist from the unfair labor practice found, and from, in any like or related manner,

interfering with its employees' rights under the Act. (A 175.) Affirmatively, the Board ordered the Company to (1) resume use of its direct-deposit system to transmit union dues upon the Union's request, and as individually authorized by unit employees, (2) bargain with the Union before making any unilateral changes to the terms and conditions of employment, and (3) post a remedial notice. (*Id.*)

SUMMARY OF ARGUMENT

This Court should affirm the Board's reasonable finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally terminating its new agreement to use its direct-deposit system to remit employees' union dues. Indeed, the factual and legal bases for that finding are essentially undisputed. Thus, the Company's witness confirmed that, after the CBA expired, the Company reached, and then unilaterally terminated, a new agreement with the Union to use its direct-deposit system to remit union dues. Moreover, the Company neither disputes that this new agreement involved a mandatory subject of bargaining, nor denies that an employer would, therefore, violate the Act by unilaterally terminating such an agreement.

In its brief to this Court, the Company fails to come to grips with the Board's finding that it reached a new agreement after the parties' CBA expired. Its only direct response is its unsupported conjecture that it was "tricked" into making

that agreement. That assertion, which has no basis in the record, ignores the Company's own witness, who admitted that the Company made that agreement.

The Company also ignores the new agreement when it argues that it could unilaterally cease dues deduction after the CBA expired. As the Board explained (A 174), the issue here is not whether an employer may unilaterally stop dues checkoff after a CBA expires, but whether the Company could unilaterally renege on the *new* agreement to use direct deposit that it reached *after* the CBA expired. The Company likewise misses the mark when it claims there was no "past practice" of using direct deposit for union dues. The Board's finding of a Section 8(a)(5) violation here turns not on past practice, but on the Company's having made and then reneged on its express agreement to use direct deposit to remit union dues.

Finally, this Court is jurisdictionally barred from addressing the Company's meritless claim that the Board's finding of a Section 8(a)(5) violation conflicts with the requirements of Section 302(c)(4) of the Labor Management Relations Act ("the LMRA"). Section 10(e) of the Act bars the Court from considering that claim because the Company never raised it before the Board. In any event, the Company fails to cite any support for its apparent claim that Section 302 permits an employer to unilaterally terminate an existing agreement to use its direct-deposit

system to remit union dues from employees who have executed written authorizations that are revocable at will.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY TERMINATING ITS NEW AGREEMENT TO LET EMPLOYEES USE ITS DIRECT DEPOSIT SYSTEM TO PAY THEIR UNION DUES

A. An Employer May Not Unilaterally Terminate an Existing Agreement on a Mandatory Subject of Bargaining, such as the Procedure for Remitting Union Dues

Section 8(a)(5) and (d) of the Act (29 U.S.C. § 158(a)(5) and (d)) make it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" with respect to "wages, hours and other terms and conditions of employment."[4] Accordingly, Section 8(a)(5) bars an employer from unilaterally discontinuing terms and conditions of employment that concern a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962); *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 128, 131 (D.C. Cir. 2001). It is settled, and the Company does not dispute, that employee payroll deductions, such as the direct deposit of union dues at issue here, are mandatory subjects of bargaining. *Quality*

[4] Moreover, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(5) results in a "derivative" violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

House of Graphics, 336 NLRB 497 (2001); *King Radio*, 166 NLRB 649, *enfd.*, 398 F.2d 14 (10th Cir. 1968). Thus, once an employer, like the Company here, agrees to use direct-deposit to remit union dues, that agreement is a term and condition of employment, which the employer may not unilaterally discontinue without first bargaining with the Union to impasse or agreement. *See Katz*, 369 U.S. at 747; *Honeywell Int'l, Inc.*, 253 F.3d at 128, 131.

The factual findings underlying the Board's decision—such as its finding here that, after the CBA expired, the parties reached a new agreement to use direct deposit to pay union dues—are conclusive if supported by substantial evidence on the record as a whole. *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951); *accord IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986). Further, this Court will adopt the Board's assessment of witness credibility—such as its finding that union agent Hall credibly testified that the Company agreed to use direct deposit to remit union dues—unless it is "hopelessly incredible" or "self-contradictory." *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988).

Finally, the Board's interpretation of the Act must be affirmed "as long as it is rational and consistent with the Act." *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1459 (D.C. Cir. 1997). "Congress has made a conscious decision" in Section 8(d) of the Act (29 U.S.C. § 158(d)) to delegate to the Board

"the primary responsibility of marking out the scope . . . of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979). Accordingly, the Board's determination as to whether or not the parties had a statutory duty to bargain must be affirmed if it "is reasonably defensible." *Id.* at 497.

B. The Company Violated Section 8(a)(5) and (1) of the Act by Unilaterally Terminating Its New Agreement To Use Direct Deposit To Deduct Union Dues From the Paychecks of Employees Who Signed Written Authorizations for Such Direct Deposits

The Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally terminating the new agreement that it made with the Union several months after the CBA expired to use its direct-deposit system to remit union dues. As we now show, the Board's finding that the Company made and then reneged on its agreement is well supported by undisputed legal principles and by the substantial evidence, which includes the admissions of the Company's own witness.

Indeed, the legal and factual principles underlying the Board's finding are not in serious dispute. The Company does not deny that direct deposit of union dues is a mandatory subject of bargaining, or that an employer would, therefore, violate the Act by unilaterally terminating an agreement on that subject. Moreover, both the Company's and the Union's witnesses confirmed that the Company reached, and then unilaterally terminated, a new agreement to use its direct-deposit system to remit union dues. Thus, both Union Representative Hall

and Company Administrative Manager Twenter testified that, after the parties' CBA expired and the Company ceased dues deductions, they reached a new agreement to allow employees who had signed written authorizations to use the Company's direct-deposit system to pay their dues. (A 174; 29, 47, 168.) Not only did Twenter willingly agree to that arrangement, she told Hall that it was "a good idea." (A 173; A 29.) The Company also agrees (Br 10) that it successfully conducted a full trial run of the agreed-upon direct deposit, and then implemented that agreement for a full pay period. (A 174, 29-30, 47.) Finally, the Company admits (Br 10-11) that it unilaterally terminated that agreement. (A 174; A 29-30, 47, 169.)

These undisputed facts leave no doubt that the Company violated Section 8(a)(5) and (1) of the Act when it unilaterally reneged on its new agreement with the Union to remit union dues by direct deposit. As noted, the Company does not dispute that the direct deposit of union dues is mandatory subject of bargaining. Thus, it follows that the Company violated the Act by unilaterally terminating its agreement on that subject. *See* cases cited above at pp. 9-10 (holding that an employer violates Section 8(a)(5) by unilaterally terminating an agreement on a mandatory subject of bargaining).

In response, the Company fails to come to grips with the Board's well-supported finding that it reached a new agreement on the use of direct deposit to

remit union dues. It claims (Br 20-21), for example, that it was "tricked" into making that agreement, but fails to cite any record evidence to support its assertion. Moreover, the Company ignores the unchallenged testimony of Union Representative Hall and Company Administrative Manager Twenter, who both testified (A 29, 47) that the Company agreed to the use of direct deposit for payment of union dues. Indeed, Twenter stated that the agreement was a "good idea." (A 173; 29.)

Nor is the Company helped (Br 18) by Twenter's subsequent May 24, 2002 letter in which she reneged on the parties' agreement, stating that "establishing direct deposit for dues was a mistake." (A 169.) Twenter's letter only serves to confirm the Board's finding that the Company unilaterally reneged on its agreement. Moreover, the Company cites nothing to support its apparent claim that it may unilaterally terminate an existing agreement on a mandatory subject of bargaining merely because it later regrets having reached that agreement.

In sum, the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally terminating an existing agreement on a mandatory subject of bargaining, namely, the use of direct-deposit to remit employees' union dues. As shown below, the Company's brief points to nothing that would warrant disturbing the Board's finding.

1. The Company's defense is rooted in its erroneous assumption that this case turns on the dues-checkoff clause in the expired CBA, which simply ignores its new agreement to use direct-deposit to remit union dues

As discussed (pp. 11-13), the Company does not seriously dispute the Board's well-supported finding that, after the CBA expired, the Company reached, and then unilaterally terminated, a new agreement with the Union on the use of direct deposit to remit union dues. Instead, the Company simply ignores that finding by focusing instead (Br 14-21) on whether it had to comply with the separate dues-deduction clause of the expired CBA. As we now explain, however, the expired CBA is irrelevant here; rather, this case turns on the fact that the Company reached a *new* agreement to use its direct-direct system to remit union dues.

Thus, the Company completely misses the mark when it relies (Br 14-16) on cases, such as *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), *enf'd sub nom. Industrial Union of Marine & Shipbuilding Workers v. NRLB*, 320 F.2d 615, 619 (3d Cir. 1963), which addressed whether an employer must comply with the dues-checkoff clause of an *expired* CBA. As the Board cogently explained in the instant case (A 174), the issue here is not whether the Company could unilaterally cease dues checkoff after the CBA expired. Rather, the issue is whether the Company, having later reached a *new* agreement with the Union for the direct deposit of union dues, acted unlawfully when it unilaterally terminated that *unexpired*

agreement. Accordingly, the cases cited by the Company (Br 14-16) are plainly off point because none of them addressed whether an employer may unilaterally terminate a new and unexpired agreement for the direct-deposit of union dues.[5]

Nor does the Company get anywhere by claiming (Br 17) that the direct deposit of union dues merely continues the dues-checkoff procedure of the expired CBA. Rather, as the Board explained (A 174), the fact remains that the Company acted unlawfully by unilaterally reneging on its new agreement for direct deposit of union dues, even assuming that agreement and dues checkoff are "functionally the same." In sum, the Company's arguments are all premised on the same mistake: they wrongly assume that this case turns on the terms of the expired CBA, and ignore the parties' new agreement for the direct-deposit of union dues.

The Company's remaining arguments do little more than repeat this error. Thus, for example, the Company gains no ground by claiming (Br 19) that it is "a legitimate economic weapon" for an employer to discontinue dues check-off after a CBA expires. Again, the Company ignores how it unilaterally reneged on a new and unexpired agreement to let employees use direct deposit to pay dues. The Company errs in suggesting that an employer may unilaterally renege on an

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[5] Moreover, those cases are also inapposite because, as the Company admits (Br 14), they addressed a situation where dues checkoff "implemented . . . union security provisions." *Bethlehem Steel*, 136 NLRB at 1502. That situation is not at issue here, because parties reached a *new* direct-deposit agreement *after* the CBA containing the union security clause had expired, thus, there was no union-security clause to implement here.

existing agreement that involves a mandatory subject bargaining. Indeed, that suggestion is directly contrary to established Section 8(a)(5) principles. *See* cases cited above at pp. 9-10.

Next, the Company mixes apples and oranges when it claims (Br 23-26) that because it abruptly terminated its new agreement for the direct-deposit of union dues, there was no "past practice." The "past practice cases cited by the Company (*id.*) do not address the issue here, which is whether an employer may unilaterally terminate an express agreement on a mandatory subject of bargaining. Instead, the cases on which the Company relies involved a very different issue: whether, in the absence of an express agreement, the employer's practice of bestowing a certain benefit on employees established that benefit as a term and condition of employment. Those cases and that issue have no bearing on this case, which turns not on a past practice in the absence of an agreement, but on the parties express agreement to allow the use of direct deposit to pay union dues.

Nor does the Company help itself by claiming (Br 26) that the Board erred in finding that the Company "did not interpret its handbook." The Company utterly fails to explain how that claim is relevant to whether it lawfully terminated its agreement on the direct deposit of union dues. The Company claims, opaquely (*id.*), that "Mary Twenter's May 24, 2002 letter to the employees [stating that the Company had cancelled direct deposit of union dues] is all that is necessary." That

claim is puzzling, however, because that letter (A 169) does not refer to the handbook at all. Nor does the Company explain here how its alleged, prior unilateral changes to its handbook somehow justify unilaterally terminating the parties' agreement to use direct deposit to remit union dues.[6]

2. Section 10(e) of the Act bars the Company's untimely and meritless claims concerning Section 302(c)(4) of the LMRA

On review, the Company claims (Br 13-18) for the first time in these proceedings that the Board's finding of a Section 8(a)(5) violation here conflicts with Section 302(c)(4) of the LMRA (29 U.S.C. § 186(c)(4)), which assertedly (Br 14-15, 18) limits dues deduction to where there is an existing CBA with a dues-checkoff clause. Section 10(e) of the Act (29 U.S.C. § 160(e)), however, bars this untimely claim. Under Section 10(e), "no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary

[6] Before the Board (A 174), the Company had argued that the reservation of rights clause in the handbook permitted it to unilaterally interpret and modify the direct-deposit system. The Company failed, however, to make this claim in the argument section of its brief (Br 26), and it is thus barred from pressing such a claim in this Court. *See Dunkin' Donuts Mid-Atlantic Dist. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (Fed R. App. Proc. 28(a)(9) requires that the argument portion of a party's opening brief contain the parties' contentions and the reasons for them, with citations to the authorities and portions of the record on which the party relies); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1180-81 (D.C. Cir. 2000) (declining to consider an argument that employer had referred to, but had not "actually argue[d]," it its opening brief). In any event, the Board properly rejected that claim (A 174), reasonably finding that the Company neither modified nor interpreted its handbook when it discontinued direct deposit of union dues. As the Board further noted (*id.*), the unilaterally promulgated handbook could not even arguably have waived the Union's bargaining rights.

circumstances not present here. Yet, the Company failed to urge any Section 302 claim before the Board. Indeed, it did not even mention Section 302 in the exceptions (SA 1) that it filed with the Board. Accordingly, the Court is jurisdictionally barred from considering the Company's Section 302 claims. *See Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1101-02 (D.C. Cir. 2001) (refusing to consider challenge that petitioner raised for the first time on appeal); *accord Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1058 (D.C. Cir. 2002) (requiring that party specifically urge claim in its exceptions in order to preserve claim for judicial review).

In any event, the Company's reliance on Section 302 is puzzling. Although, as the Company notes (Br 13), Section 302 criminally bars employers from paying money to a union, Section 302(c)(4) provides an exception for the deduction of dues from the wages of employees who have given written consent, provided that consent is revocable after a year, or, if sooner, the expiration of the applicable CBA. Here, it is undisputed that the employees' direct-deposit authorizations stated on their face that they were revocable at the employees' will. (*See* A 168 and p. 5, above.) The Company fails to explain how Section 302 would permit an employer to unilaterally terminate an existing agreement to use direct-deposit to deduct union dues pursuant to the employees' written, unrevoked authorizations.

The Company also errs to the extent it is arguing (Br 14-15) that, pursuant to Section 302, it could not honor its new agreement to use direct deposit to deduct dues because there was no signed, existing CBA. Indeed, before the Board, the Company stipulated to the opposite: it agreed (A 18) that an "employer may, after the expiration of a [CBA], continue to deduct dues and transmit them to the Union on behalf of employees without violating the Act or running afoul of [Section] 302." The Company's stipulation undermines the contrary suggestion in its brief (14-15). Indeed, the stipulation accords with caselaw holding that an employer may lawfully continue to deduct union dues after a CBA expires. *See Lowell Corrugated Container Corp*, 177 NLRB 169, 173 (169), *enf'd on other grounds,* 431 F.2d 1196 (1st Cir. 1970); *Frito-Lay, Inc.*, 243 NLRB 137, 138-39 (1979).

Nor is the Company helped (Br 14-15) by this Court's statement, in two cases addressing circumstances not present here, that Section 302(c)(4) does not permit an employer to deduct dues absent an existing CBA. The cited cases are plainly inapposite because they addressed whether an employer had to comply with the terms of an *expired* CBA, an issue which, as noted above (p. 14), has no bearing here. *See Southwestern Steel & Supply, Inc. v. NLRB,* 806 F.2d 1111, 1114 (D.C. Cir. 1986) (hiring hall provision survived expiration of CBA); *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 255 (D.C. Cir. 1991) (employer not obligated to comply with due checkoff clause of expired CBA.)

Accordingly, neither case holds that an employer may do what the Company did here, namely, unilaterally terminate an existing agreement for the direct deposit of union dues. Moreover, this Court's discussion of Section 302 in those cases is inapposite here because those cases addressed a situation where, unlike here, dues checkoff implemented a union-security clause. *See Southwestern Steel*, 806 F.2d at 1114; *see also* note 5, above.

Finally, the Company errs in suggesting (Br 21) that its oral agreement to use direct deposit to pay union dues is void because Section 302 requires that the agreement be reduced to writing in a signed CBA. The Company cites no cases on point for that claim, and given Section 8(d) of the Act (29 U.S.C. § 158(d)), an employer may not circumvent its duty to reduce an agreement to writing by reneging on that agreement.

In sum, the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally reneging on its new agreement to use its direct-deposit system to transmit union dues from the paychecks of employees who had executed direct-deposit authorization forms. The Company's brief points to nothing that would warrant disturbing the Board's finding.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Company's petition for review and enforce the Board's order in full.

JULIE B. BROIDO
Supervisory Attorney

GREGORY P. LAURO
Attorney
National Labor Relations Board
1099 14th Street, N.W.
(202) 273-2996
(202) 273-2971

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

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v.	)	Board Case No.
	)	17-CA-21700
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 4,834 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 16th day of May 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRIBUNE PUBLISHING COMPANY	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 07-1455, 07-1506
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	17-CA-21700
	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

L. Michael Ziner
The Zinser Law Firm, P.C.
414 Union Street, Suite 1200
Nashville, TN 37219

_____

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

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